SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.,

Respondents.

MOTION TO SUPPLEMENT COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes your petitioner, Ogden H. Hammond, Jr., and respectfully moves the Court that upon the consideration of the petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, that the complaint in the foregoing cause be remanded to the District Court of the United States for the District of Columbia whence it originated, with directions to that court to permit petitioner to supplement his complaint herein by the additions thereto of Paragraphs 21A and 21B, all as set forth in the record herein (R. 123), and for such other and further supplemental changes as will enable petitioner to bring forth fully the facts which have super-

vened in this cause since the filing of the complaint herein on March 18, 1941.

Supervening Facts.

The facts regarding the present motion to supplement the complaint as made in the Court of Appeals are fully related in the record (R. 121-128). We will not burden this Court by again setting them out here but we do respectfully call the Court's attention to the fact that the Court of Appeals refused to rule upon this motion to supplement the complaint when it was made before it in open court on the oral argument on March 9, 1942, taken under advisement, left undecided in the opinion of October 12, 1942, and renewed on October 19, 1942 (R. 121-123). We feel that this conduct is not in accordance with usual appellate procedure and should not be approved by this Court.

As pointed out in the motion to supplement the complaint (R. 123), petitioner was stricken from the payroll by respondents Berle and Shaw on April 17, 1941 and from that day to this has received no salary, although admittedly still a duly-commissioned Foreign Service Officer of the United States. His position is unique in the Foreign Service and unique in the history of that service. From March 18, 1941 to December 11, 1942 inclusive, petitioner had no dealing with respondents or any of them save by formal exchange of letters which amount to some sixty altogether (half written by him and half by respondent Shaw), as he was forbidden to undertake any employment or gainful occupation whatever without the express permission of respondents Berle and Shaw as the majority of the Board of Foreign Service Personnel. Leaving aside the other problems raised in this correspondence as immaterial, this Court should be informed that in November 1942 petitioner sought leave of respondents to enlist as a private in the Army of the United States, and after some discussion in the correspondence such leave was formally granted him with full

reservation of all his rights and privileges as a Foreign Service Officer, in late November 1942; pursuant thereto petitioner duly enlisted in the Army of the United States as a private on December 15, 1942.

Immediately prior to his departure from Washington on active Army duty, and on December 9, 1942, petitioner received a formal summons from respondents Berle and Shaw to a "hearing" (allegedly under Section 23i of Title 22, U. S. C.) to be held *in camera* in the Department of State, and which was there held on December 11, 1942. The gist of the charges given to petitioner were (1) That he had sought judicial relief from actions of respondents Berle and Shaw; (2) that he had engaged in correspondence with respondent Shaw; and (3) that he had consumed the time of respondents Berle and Shaw which should have been engaged in other matters. Respondents Berle and Shaw disqualified themselves as judges and a special Board was appointed to hear such matters before whom proceedings went forward on December 11, 1942, and were taken down by a court reporter. Petitioner was permitted to have counsel present but to offer no witnesses and no sworn evidence. Petitioner was not permitted to examine any of the circumstances leading up to the so-called probationary order dated March 7, 1941, and in violation of a promise made to him, neither respondent Berle nor respondent Shaw appeared to testify. Petitioner was not allowed to see or to examine the Department files on which findings adverse to him were to be based. No testimony was in fact taken, aside from an informal statement by petitioner, and petitioner's counsel was not afforded time nor opportunity to file a brief, and in fact allowed nothing except to enter legal exceptions on the record.

The Board's chief reliance was apparently on the prior probation order dated March 7, 1941 (R. 64-65), and on

secret files and data unknown to petitioner and his counsel, and denied them upon demand. Only petitioner and his counsel, aside from State Department officials and the reporter, were present, although petitioner protested the exclusion of the public. *Cf.* opinion of the Court of Appeals herein (R. 101, 102—"a public hearing"). That proceeding is still pending undetermined in the Department of State as of the date of the filing of this petition, and petitioner has applied to have it stayed until after the war under the provision of the Selective Service Act of 1940 as amended, which requires that he be restored at the termination of his military service to the same government position that he held on December 15, 1942—namely to the status of a Foreign Service Officer of the United States. (Whether that status is of satisfactory or unsatisfactory rating will depend upon the decision of this Court in the instant case.) We feel it our duty, in view of the decisions of this Court cited below, to place this full information before it, as these are supervening facts which may influence the decision of this Court in view of the state of the whole record as explained in the foregoing petition and brief, and upon this motion we feel that the interests of justice would best be served by a vacating of the judgment below and a remand of this cause to the District Court to permit the complaint to be supplemented and the entire controversy to be stayed under the Soldiers' and Sailors' Civil Relief Act of 1940 as amended.

The Law.

There is no question as to the power of this Court to enter such judgment or order as the nature of the case and the demands of justice may require. See *Camp* v. *Gress,* 250 U. S. 308, 318; *Watts, Watts & Co.* v. *Unione Austriaca, etc.,* 248 U. S. 9, 18; *Patterson* v. *Alabama,* 294 U. S. 600, 607; *Honeyman* v. *Hanan,* 300 U. S. 14, 25 *et seq.* As this Court said

in *Patterson* v. *Alabama, supra:* "And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered" (294 U. S. at 607).

In *Nicholas* v. *United States,* 257 U. S. 71, 73, this Court "on motion" remanded a suit similar in nature to the present one to the Court of Claims for further proceedings and findings of fact before proceeding to enter final judgment on the second appeal. We feel that on the authority of that case such a remand should be had in the instant case. This course of action would appear to be commanded by the case of *Texarkana* v. *Arkansas Gas Co.,* 306 U. S. 188, 203, and the authorities there cited. See especially Rule 15 (d) of the Rules of Civil Procedure. The importance of taking full evidence in an administrative proceeding before final judgment is had was recently given new emphasis by this Court in *National Labor Relations Board* v. *Indiana & Michigan Electric Co., et al.,* decided January 18, 1943.

For these reasons your petitioner respectfully requests that the above case be remanded to the District Court of the United States and upon remand that he be permitted to supplement his complaint and further to proceed as outlined in the foregoing petition and the foregoing motion.

OGDEN H. HAMMOND, JR.,
By GEORGE W. DALZELL,
Attorney for Petitioner.

DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.